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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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INTERNATIONAL EATERIES OF AMERICA, INC.

Petitioner,

v.

BROWARD COUNTY, FLORIDA

Respondent.

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

VOLUME I OF II

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TABLE OF CONTENTS

VOLUME I OF II

Appendix A *International Eateries of America, Inc. v. Broward County, Florida*, 941 F.2d 1157 (1991).

Appendix B *International Eateries of America, Inc. v. Broward County, Florida*, 726 F.Supp. 1568 (1989).

VOLUME II OF II

Appendix C *International Eateries of America, Inc. v. Broward County, Florida*, 726 F.Supp. 1556 (1987).

Appendix D Order Denying Petitioner, International Eateries of America, Inc.'s Petition for Rehearing in the case of *International Eateries of America, Inc. v. Broward County, Florida*, 941 F.2d 1157 (1991).

Appendix E Broward County Zoning Code, Article XIII, Regulation of Certain Designated Uses.

Section 39-225. Distance Limitations Between Designated Uses.

Section 39-226. Designated Uses.

APPENDIX A

INTERNATIONAL EATERIES OF AMERICA, INC.,

Plaintiff-Appellant,

v.

BROWARD COUNTY, FLORIDA,

Defendant-Appellee.

No. 90-5076

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

941 F.2d 1157; 1991 U.S. App. LEXIS 21303

September 12, 1991

SUBSEQUENT HISTORY: As Amended.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Southern District of Florida. No. 88-6472-CIV-SMA; Sidney M. Aronovitz, Judge.

DISPOSITION: Affirmed.

COUNSEL: ATTORNEYS FOR PLAINTIFF-APPELLANT: Richard L. Wilson, Orlando, Florida.

ATTORNEYS FOR DEFENDANT-APPELLEE: Tracy Lautenschlager, Ft. Lauderdale, Florida.

JUDGES: Kravitch and Cox, Circuit Judges, and Henderson, Senior Circuit Judge.

OPINIONBY: KRAVITCH

OPINION: [*1158] KRAVITCH, Circuit Judge

Appellant International Eateries of America, Inc. challenges Broward County, Florida's adult entertainment zoning ordinances as violative of the first amendment. Because we hold that the ordinances satisfy the standard set out by the Supreme Court in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), we reject International Eateries' challenge and affirm the decision of the district court.

I

International Eateries operates a nightclub known as "Thee Dollhouse III" in unincorporated Broward County, Florida. The parties have stipulated that the primary form of entertainment at Thee Dollhouse III is non-obscene nude dancing. In April 1986, appellee Broward County served two notices of violation upon International Eateries, informing it that Thee Dollhouse III was operating in violation of several Broward County zoning ordinances. The first notice stated that Thee Dollhouse III was in violation of the County's distance ordinances, [**2] which prohibit the location of adult nightclubs within 500 feet of a residential district and 1000 feet of a church. The second notice stated that Thee Dollhouse III was in violation of the County's special uses ordinances, which permit operation of adult nightclubs only within a special zoning district. It is undisputed that Thee Dollhouse III is within 500 feet of a residential district and

that three residential properties are less than 500 feet away. It is also undisputed that a church is located approximately 885 feet from Thee Dollhouse III. Finally, it is undisputed that Thee Dollhouse III is not within the special uses zoning district.

International Eateries filed an action in federal district court seeking to enjoin the County from enforcing the ordinances. The district court stayed the proceedings until International Eateries had pursued administrative remedies with the County. International Eateries then applied to the County for a rezoning of the property and to the County Board of Adjustment for a variance from the distance requirements. The County denied the application for rezoning and therefore had no reason to act on the variance application.

In its first opinion, [**3] International Eateries v. Broward County, 726 F.Supp. 1556 (S.D.Fla.1987) ("Dollhouse I"), the district court held that the special uses ordinances as applied to International Eateries violated the first amendment because the ordinances did not advance a substantial government interest and did not leave available alternative channels for International Eateries to conduct its business. Dollhouse I, 726 F.Supp. at 1566-67. As for the distance ordinances, the court held that they were not unconstitutional on their face, and that International Eateries' as-applied challenge was premature because the County had not yet ruled on the application for a variance. Id. at 1563-64.

International Eateries then filed a petition with the County's Building and Zoning Enforcement Division, seeking an automatic waiver of the 500-foot residential district prohibition. That ordinance states that the 500-foot

requirement shall be waived upon presentment of "a written petition requesting the waiver, signed by 51 percent of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed location [**4] of the designated use." International Eateries' petition contained the names of eight persons residing or owning property in the residential district. Although this was a majority of the owners and residents of the [*1159] area, the County denied the petition because it interpreted the ordinance as also requiring signatures of operators and managers of businesses within the area. International Eateries also requested waivers of the distance ordinances from the County's Planning and Zoning Board and from the County Commission, but these requests were denied.

In June 1988, International Eateries again filed an action in district court seeking to enjoin enforcement of the distance ordinances. The district court again denied relief, this time finding the ordinances valid as applied. International Eateries v. Broward County, 726 F.Supp. 1568 (S.D. Fla. 1989) ("Dollhouse II"). International Eateries now appeals the district court's decision in Dollhouse II.

II

The regulation of non-obscene n1 nude dancing often has been addressed in the federal courts. On several occasions, the Supreme Court has assumed, without deciding, that nude dancing is protected expression under [**5] the First Amendment. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66, 101 S. Ct. 2176, 2181, 68 L. Ed. 2d 671 (1981) ("nude dancing is not without its First Amendment protections from official regulation"); see

also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975); Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975); California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972). In a related context, the Supreme Court has held that under some circumstances cities may enact zoning ordinances that require adult movie theatres to locate only in certain areas, provided that the purpose of the regulation is to control the "secondary effects" of these businesses. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976). These [**6] cases have been applied by the lower federal courts to the regulation of nude dancing. See, e.g., International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986); SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988); Envy Ltd. v. City of Louisville, 734 F. Supp. 785 (W.D. Ky. 1990).

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n1 Obscenity is not protected by the first amendment, see Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and is not at issue in this case.

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A

This term, the Supreme Court squarely addressed the protection afforded to nude dancing under the First

Amendment. In Barnes v. Glen Theatre, Inc., U.S. , 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991), respondents sought to enjoin enforcement of Indiana's public indecency statute. Respondents contended that the statute, which prohibited "appear[ing] in a state of nudity" in a public place, was invalid as applied [**7] to the nude dancing performed at two establishments. Although the Court upheld the statute, the effect of the Court's plurality holding on our case is not readily apparent. Keeping in mind that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,'" Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977), we examine in greater detail the three opinions that made up the five-member majority.

Chief Justice Rehnquist, writing for Justices O'Connor and Kennedy, began his analysis by noting that the statements in Schad, Doran, and LaRue discussed above "support the conclusion of the Court of Appeals that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." Id. at 2460 (opinion of Rehnquist, C.J.). In order to determine "the level of protection to be afforded to the expressive conduct at issue," [**8] the opinion analyzed the statute under the four-part inquiry of United States v. O'Brien, [*1160] 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed. 2d 672 (1968), the framework applied to symbolic speech. The second prong of that test requires that the statute further an important or substantial government interest. Although the Chief Justice's opinion noted that "it is impossible to discern, other than from the text of the

statute, exactly what governmental interest the Indiana legislators had in mind," the opinion nevertheless concluded that "the statute's purpose of protecting societal order and morality is clear," Barnes, 111 S. Ct. at 2461, and that such a purpose furthers a substantial governmental interest. Id. at 2462.

O'Brien's third prong requires that the interest to be protected is unrelated to the suppression of free expression. Here, the opinion stated that because the statute did not prohibit nude dancing, but rather all public nudity, the statute was not intended to suppress expression. Id. 111 S. Ct. at 2463. Finally, O'Brien requires [**9] that the restriction on free expression be no greater than is essential to the furtherance of that interest. Here, Chief Justice Rehnquist concluded that Indiana's requirement of pasties and a G-string was the "bare minimum" necessary to achieve the state's interest. Id.

Justice Scalia concurred in the judgment, but not the reasoning, of the plurality. According to Justice Scalia, "the challenged regulation must be upheld, not because it survives some lower level of First-Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First-Amendment scrutiny at all." Id. (Scalia, J., concurring). Because the statute was not covered by the First Amendment, it only needed to survive rational-basis review to be valid under the Due Process Clause -- a test that was easily met according to Justice Scalia. Id. 111 S. Ct. at 2468.

Justice Souter, the fifth Justice to uphold the statute, agreed with Chief Justice Rehnquist's opinion that nude dancing is subject to First Amendment protection, and also

agreed that the statute should be analyzed under O'Brien.

He further stated, [**10] however, that "I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments." Id. 111 S. Ct. at 2468 (Souter, J., concurring) (emphasis added). Justice Souter explained his difference with the plurality as follows:

It is, of course, true that this justification has not been articulated by Indiana's legislature or by its courts. As the plurality observes, "Indiana does not record legislative history, and the state's highest court has not shed additional light on the statute's purpose." While it is certainly sound in such circumstances to infer general purposes "of protecting societal order and morality . . . from [the statute's] text and history," I think that we need not so limit ourselves in identifying the justification for the legislation here, and may legitimately consider petitioners' assertion that the statute is applied to nude dancing because such dancing "encourages prostitution, [**11] increases sexual assaults, and attract[s] other criminal activity." Id. at 2469 (ellipses and brackets original, citations omitted).

The only legally significant difference between the opinions of the Chief Justice and of Justice Souter is the societal interest viewed as sufficient to allow the government regulation. Thus, in applying the second prong of O'Brien -- furtherance of a substantial government interest -- according to the plurality, society has a substantial interest in protecting order and morality; according to Justice Souter, morality may not be a

substantial government interest, but combatting the secondary effects of adult entertainment establishments is.

As for the third prong, content neutrality, the plurality found that the statute was neutral because it was aimed at all public nudity, rather than only nude dancing; Justice Souter found this prong satisfied because the statute is aimed at secondary effects, rather than at nude dancing itself.

[*1161] Prior to Barnes, our decision would have been guided by the secondary-effects analysis of Renton, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). [**12] Having examined the opinions in Barnes, we conclude, for two reasons, that this is still the case. First, Justice Souter, whose vote was necessary to uphold the statute, stated that morality justifications were not a substantial government interest, but that control of secondary effects did constitute such an interest. Thus, in order to uphold a statute regulating nude dancing, it is still necessary after Barnes that the statute meet the secondary effects test of Renton.

Second, the statute at issue in Barnes and the ordinance at issue in this case are different in a significant respect. In Barnes, the statute prohibited all public nudity, regardless of its expressive content. Here, Broward County's distance ordinances only apply to "designated uses," which include the "adult nightclub" involved in this case. Justice Scalia, whose vote was also necessary to uphold the statute in Barnes, based his analysis on the "general" nature of the statute and specifically noted that "where the government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional." Barnes, 111 S. Ct. at 2466 [**13] (Scalia, J., concurring) (emphasis original). Thus, Justice

Scalia's analysis would not apply to a statute like the one in this case that singles out nude dancing rather than broadly prohibiting all public nudity.

Although this discussion does not explain how the Supreme Court would rule in the instant case, it does make clear that the judgment reached by a majority of the Justices in Barnes does not directly govern our case. This being so, we conclude that Renton still controls our analysis.

B

In Renton, the Supreme Court addressed the validity of an ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Relying on Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976), which upheld a zoning ordinance that limited the showing of adult films to certain locations, the Court noted that "zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." [**14] Renton, 475 U.S. at 49, 106 S. Ct. at 929-30. The Court stated that the inquiry, therefore, was whether "the ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." Id. at 50, 106 S. Ct. at 930. n2

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n2 It might be argued that because we are addressing a regulation of nude dancing, as was the Court in Barnes, rather than a regulation of motion pictures, as

was the Court in Renton, we should apply the O'Brien "symbolic conduct" analysis rather than the Court's "time, place, and manner" analysis. In O'Brien, the Court stated that a statute regulating symbolic conduct was valid if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377, 88 S. Ct. at 1679.

There has been considerable confusion in the Court's cases as to when each analysis should apply. In recent years, however, the Court has stated several times that "in the last analysis [the O'Brien test] is little, if any, different from the standard applied to time, place, or manner restrictions." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298, 104 S. Ct. 3065, 3071, 82 L. Ed. 2d 221 (1984); see also Barnes, 111 S. Ct. at 2460 (opinion of Rehnquist, C.J.) (noting the similarities and applying O'Brien); Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 2757, 105 L. Ed. 2d 661 (1989) (noting the similarities and applying time, place, and manner analysis). Although the wisdom of this trend toward a single standard has been questioned, see S. Williams, Content Discrimination and the First Amendment, 139 U.Pa.L.Rev. 615, 636-54 (1991), it is sufficient for our purposes that the Supreme Court has determined that under current Court doctrine the answer should be the same regardless of which analysis is used. Because we conclude that the ordinance at issue in this case more closely resembles the ordinance in Renton than the statute in Barnes, we follow Renton and apply time, place,

and manner analysis.

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[**15]

Before applying this test, we note that although the Court in Renton stated the [*1162] inquiry as containing two elements (serving a substantial government interest and allowing for reasonable alternative avenues of communication), the Court's time, place, and manner cases generally have required a third element: the regulation must be narrowly tailored to serve the government interest at issue. In fact, when the Renton Court enunciated the test as containing two parts, it cited two cases, both of which addressed the narrow-tailoring requirement. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293-96, 104 S. Ct. 3065, 3069-70, 82 L. Ed. 2d 221 (1984); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654, 101 S. Ct. 2559, 2567, 69 L. Ed. 2d 298 (1981). Moreover, the Court has required the narrow-tailoring element in cases decided after Renton. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 2756-60, 105 L. Ed. 2d 661 (1989); Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 2502-04, 101 L. Ed. 2d 420 (1988). [**16] Finally, although the Renton Court did not specifically include narrow tailoring in its formulation of the standard to be applied, the Court later examined "the method chosen by Renton to further its substantial interests," and found that that method was "narrowly tailored" to further the government interest in that case. Renton, 475 U.S. at 52, 106 S. Ct. at 931. Thus we do not believe that the Renton Court intended to eliminate the narrow-tailoring requirement from time, place, and manner analysis, and we therefore consider that requirement in our

analysis below.

III

A

We first address whether Broward County's ordinances further a substantial government interest. In Renton, the Court recognized that a city's interest in protecting the quality of urban life from the secondary effects of adult businesses is indeed substantial. Renton, 475 U.S. at 50, 106 S. Ct. at 930. The distance ordinances prohibit the location of an "adult nightclub" within 500 feet of a residentially zoned district or 1000 feet of a church. The ordinances also specifically state that certain businesses have a "deleterious [**17] effect" on the residential and business areas around them and that the purpose of the ordinance is to "ensure that these adverse effects will not contribute to the blighting and downgrading of the surrounding neighborhood." Thus, the ordinances are aimed at the very type of harm that the Renton Court found to create a substantial government interest. n3

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S. Ct. at 927. Because Justice Souter wrote only for himself in Barnes, we continue to follow the Renton Court's approach of gleaning the government interest at stake from the ordinance itself rather than implying one where none is evident in the ordinance.

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[**18]

The Renton Court also recognized, however, that the enacting body must have a reasonable basis for its belief that the harm to be protected against in fact exists. The city need not conduct its own studies to make this determination. According to the Court:

The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. Id. at 51-52, 106 S. Ct. at 931. Here, the district court found that Broward County relied on the experiences of Detroit in enacting its ordinances. Detroit's distance ordinances were upheld in Young v. American Mini Theatres. International Eateries [*1163] argues, however, that because the County's ordinances were not modeled exactly after those of Detroit, Detroit's studies should not suffice to justify the County's ordinances. The Supreme Court answered this argument in Renton:

Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater [**19] zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of

adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton. Renton, 475 U.S. at 52, 106 S. Ct. at 931. We therefore conclude that Broward County's distance ordinances further a substantial government interest.

B

We next address whether the distance ordinances are narrowly tailored to further the County's interest in combatting the secondary effects of adult entertainment establishments. In Renton, the Court stated that the ordinance was narrowly tailored because it affected "only that category of theaters shown to produce the unwanted secondary effects. . . ." Renton, 475 U.S. at 52, 106 S. Ct. at 931. Here, the ordinances are of a similarly limited scope, focusing only on those businesses likely to produce secondary effects.

International Eateries argues, however, that there is no indication that a single nude dancing establishment causes deterioration of the surrounding area. According [**20] to International Eateries, the ordinances are designed to prevent the concentration of such establishments. While it is true that the ordinances prohibit the location of an adult nightclub within 1,000 feet of another adult business, the ordinances are not only concerned with concentrations of adult establishments. The ordinances separately prohibit adult businesses from locating near other uses such as residential areas, churches, and schools. The County obviously determined that even a single adult business could have deleterious effects on these property uses. So long as the distance requirements are not greater than necessary to prevent the secondary

effects, they are narrowly tailored to serve their purpose. In this case, the distances required by the ordinances are no farther than those approved by the Court in Renton; thus we cannot say the requirements are not narrowly tailored.

International Eateries further argues that there is uncontradicted evidence in the record that Thee Dollhouse III has not in fact caused any adverse effects on surrounding property values and that property values have actually increased at a higher rate than before the opening of Thee Dollhouse [**21] III. This argument holds no weight. As discussed above, Broward County appropriately tailored its distance ordinances to further its substantial government interest. If the decision was valid ex ante, International Eateries cannot justify violating the ordinances by showing that they were unwise ex post.

International Eateries also challenges the waiver provision of the residential distance requirement. That provision allows the residential distance requirement to be waived upon presentment of a petition signed by "51 percent of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed use." Although International Eateries presented a petition containing the signatures of a majority of those persons owning real property or residing within 500 feet of Thee Dollhouse III, the County interpreted the ordinance as requiring a majority of all the persons listed in the provision and therefore denied the waiver request.

International Eateries contends that the waiver provision is not narrowly tailored because the ordinance is designed to protect property values of residents, yet it allows businesses to block a waiver. International [**22] Eateries notes that if residential property was not located in the vicinity, those businesses would have no right to object

to the location of the establishment. Thus, according to appellant, it is absurd to allow an unprotected group to thwart the [*1164] waiver when a majority of the very group the ordinance was designed to protect has given its consent.

We are unpersuaded by this argument. First, appellant has pointed to no authority indicating that the County is even required to provide a waiver opportunity. The Court in Renton upheld similar distance requirements and made no mention of any opportunity for a party to have the requirements waived. Also, the other ordinance at issue in this case, the church distance requirement, does not have a waiver provision, and International Eateries has not argued that one is required. Thus, we fail to see how a valid distance requirement can become invalid by adding an opportunity, albeit a difficult one to meet, for the requirement to be waived. n4 Moreover, the fact that the ordinance prohibits adult entertainment within 500 feet of a residential area does not mean that the ordinance is concerned only with residents. The ordinance specifically [**23] addresses the secondary effects of adult businesses "upon the adjacent business and residential areas" (emphasis added). Certain businesses are more likely to locate near residential areas than are other businesses, and those businesses may be more likely to be injured by the proximity of adult entertainment. The County was entitled to take this into account. n5

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n4 Of course, a waiver provision that allowed for arbitrary enforcement would be invalid. See City of Lakewood v. Plain Dealer Publishing, Co., 486 U.S. 750, 108 S. Ct. 2138, 2143, 100 L. Ed. 2d 771 (1988) ("In the

area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."); see also Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51, 89 S. Ct. 935, 938, 22 L. Ed. 2d 162 (1969). In this case, however, the waiver provision leaves no room for arbitrary enforcement. It specifically states that a waiver "shall" be granted upon the presentment of the requisite number of signatures. [**24]

n5 International Eateries also argues that the County improperly interpreted the waiver provision. According to International Eateries, the use of the term "or" in the provision indicates that a majority of any of the groups listed in the provision is sufficient to obtain a waiver. We have no power to decide this issue. The interpretation of the County ordinance is purely a matter of state law. So long as the County applies the ordinance consistently, we are empowered only to determine whether that interpretation withstands constitutional scrutiny. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65, 101 S. Ct. 2176, 2181, 68 L. Ed. 2d 671 (1981); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 643, 101 S. Ct. 2559, 2562, 69 L. Ed. 2d 298 (1981); G. Gunther, Constitutional Law 1153 n. 11 (11th ed. 1985).

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Finally, International Eateries argues that the church distance ordinance is not narrowly tailored because it has a distance requirement of 1,000 feet, and the County has not provided [**25] a sufficient justification for why the requirement needs to be twice the distance of the 500-foot

residential requirement. International Eateries points to Walnut Properties, Inc. v. City of Whittier, 808 F.2d 1331 (9th Cir. 1987), to support its argument. That opinion arose out of a dispute involving an ordinance, like the one at issue in this case, that prohibited the location of an adult business within 1,000 feet of a church. The district court originally held that the ordinance was invalid, and the Ninth Circuit affirmed. Walnut Properties, Inc. v. City of Whittier, 762 F.2d 1020 (9th Cir. 1985). The Supreme Court, however, issued its opinion in Renton shortly thereafter and then remanded the case for reconsideration in light of Renton. City of Whittier v. Walnut Properties, Inc., 475 U.S. 1042, 106 S. Ct. 1255, 89 L. Ed. 2d 566 (1986). The opinion cited by International Eateries was the order by the Ninth Circuit remanding the case to the district court. In its instructions to the district court, the court stated: "The City's interest in preventing urban blight and downgrading of residential and [**26] commercial properties might logically support the ordinance's requirement that adult businesses be 1,000 feet apart, but it might not support the requirement that they be 1,000 feet from a church." Walnut Properties, 808 F.2d at 1335. This statement was merely one of several comments made by the court to guide the district court's analysis. The court was not ruling on the church distance [*1165] requirement. After remand to the district court, the district court again held the ordinance invalid, and the Ninth Circuit affirmed. Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1107-10 (9th Cir. 1988), cert. denied, 490 U.S. 1006, 109 S. Ct. 1641, 104 L. Ed. 2d 157 (1989). The appellate court specifically limited its holding, stating that it was based entirely on the fact that there were not adequate alternative locations in the city for adult businesses. Id. Thus, contrary to International Eateries' assertion, the case does not stand for

the proposition that a 1,000-foot church distance ordinance is excessive. Rather, the case simply follows the Renton analysis, holding that where there are not [**27] sufficient alternative locations, an ordinance zoning adult businesses is invalid. We therefore hold that in this case the ordinances are narrowly tailored to serve their purpose.

C

Finally, unlike the ordinance in Walnut Properties, the Broward County ordinances allow for reasonable alternative avenues of communication. It is undisputed that there are twenty-six other sites in unincorporated Broward County where International Eateries could locate an adult entertainment establishment without violating the distance ordinances. International Eateries does not argue that the ordinances are invalid in this respect.

IV

In view of the above discussion, we hold that the Broward County distance ordinances are valid under the Supreme Court's analysis in Renton.

AFFIRMED.

APPENDIX B

INTERNATIONAL EATERIES OF AMERICA, INC., a Florida corporation, d/b/a "Thee Dollhouse III",

Plaintiff,

v.

BROWARD COUNTY, a political subdivision of the State of Florida,

Defendant.

Case No. 88-6472-Civ

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

726 F. Supp. 1568; 1989 U.S. Dist. LEXIS 15238

December 15, 1989, Decided

COUNSEL: [**1]

Law Office of BRUCE L. RANDALL, Ft. Lauderdale, Florida, ATTORNEY FOR PLAINTIFF.

BARBARA A. HALL, ESQUIRE, Assistant County Attorney, Ft. Lauderdale, Florida, ATTORNEY FOR DEFENDANT.

JUDGES: Sidney M. Aronvitz, United States District Judge.

OPINIONBY: ARONOVITZ

OPINION: [*1570] MEMORANDUM OPINION CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW

SIDNEY M. ARONOVITZ, UNITED STATES DISTRICT JUDGE

THIS CAUSE was tried non-jury before the Court at which time testimony and evidence were adduced by both parties. Also, by stipulation and agreement, the parties agreed that the prior record and all exhibits in the earlier related action which included the same parties, that case being 86-6348-Civ-Aronovitz (hereinafter referred to as Dollhouse I), be taken into consideration by this Court through judicial notice, including the Final Judgment and Memorandum Opinion of this Court in that case. (See also Paragraph Number 4 of the Joint Pre-Trial Stipulation.) Likewise, in the course of the earlier case, this Court upon plaintiff's motion, visited the location and the surrounding area of the subject property involved in this litigation in the company of counsel for both sides, and viewed in open Court, a video tape presented by plaintiff of the surrounding area. Additionally, at the trial of this [**2] action (hereinafter referred to as Dollhouse II), further evidence was adduced and received beyond that offered in Dollhouse I. The Court has considered all the evidence, oral argument, memoranda of law, the viewing of the location, and being otherwise fully advised in the premises, makes and enters herewith its Findings of Fact and Conclusions of Law.

Nature of Prior Proceedings and Relationship Hereto

Dollhouse I raised two separate and independent issues; namely,

(1.) -- Whether the "special uses" ordinances applicable to adult nightclubs was Constitutional as applied to the location of Thee Dollhouse III in preventing its use in presenting non-obscene, nude dancing as the primary form of entertainment for its customers; and
(2.) -- Whether or not the distance ordinances prohibiting the location of such use within 500 feet of a residentially-zoned district or within one thousand (1,000) feet of a church, kindergarten, nursery, elementary, middle or high school or day care center were either facially or otherwise unconstitutional.

Dollhouse I is a published opinion found under the title and citation: International Eateries of America, Inc., a Florida corporation, d/b/a "Thee [**3] Dollhouse III" v. Broward County, a political subdivision of the State of Florida, 726 F.Supp. 1568 [*1571] S.D. Fla. 1989), and is also found as a part of the record in this case. That Memorandum Opinion and the Final Judgment issued thereon are made a part of these proceedings by agreement of the parties and judicial notice thereof is taken by this Court. Therein, this Court found that the special uses ordinance was unconstitutional as applied to this plaintiff because there was only one location in all of Broward County, Florida already zoned B-2B, and without an application for permission to the Broward Zoning Board and the Broward County Commission no location could be utilized for the designated use. However, in that same opinion, this Court found that both the distance ordinances as to churches, schools, etc., and residential districts are facially valid. n1

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n1 At the time Dollhouse I was before the Court, the

plaintiff had applied for zoning variances to Broward County from both the "special uses" ordinances and the "distance requirements" ordinances. Broward County denied the special uses and therefore considered the application for the distance requirements as moot and did not rule thereon. As noted herein, this Court later found the special uses ordinances Unconstitutional as applied and thereupon, plaintiff reapplied for a ruling with regard to the variance and distance requirements. Therefore, technically, that ruling of facial invalidity was not then timely. Hence it is revisited here.

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Now in this action (Dollhouse II), the plaintiff first applied to Broward County Zoning Board and County Commission for a variance from the distance requirements and having been denied same, seeks again to attack the facial and applied Constitutionality of the distance ordinances, arguing:

A) that the provision of the ordinance permitting a waiver from the residential distance prohibition and

B) the provision requiring a one thousand (1,000) foot separation between an adult business and a church, school, etc., are an invalid prior restraint, unconstitutionally vague and overbroad, and a substantial restriction of First Amendment Rights. Among other defenses, defendant asserts that the Constitutionality of the distance ordinances has already been decided in Dollhouse I and therefore the issues raised herein are res judicata.

Basis of Federal Jurisdiction

This complaint for permanent injunction, declaratory judgment and attorney's fees is brought pursuant to 42 U.S.C. @@ 1983 and 1988. Jurisdiction is founded upon 28 U.S.C. @@ 1331 and 1343.

FINDINGS OF FACT

Some of the following Findings of Fact contained in Dollhouse I are still pertinent and relevant hereto, and [**5] others are based on the evidence heard in this case.

1. Plaintiff, International Eateries of America, Inc., a Florida corporation, operates a restaurant and nightclub at 3561 North Federal Highway in unincorporated Broward County, Florida, known as "Thee Dollhouse III. Thee Dollhouse III presents non-obscene, nude dancing as the primary form of entertainment for its customers.

2. Defendant Broward County has a population in excess of one million persons, and occupies more than 410 square miles on Florida's southeast coast, with the city of Fort Lauderdale being the County seat. Within the unincorporated area of Broward County, which is involved in this litigation, there are approximately 150 square miles.

3. Thee Dollhouse III presents non-obscene, nude dancing as the primary form of entertainment for its patrons (the parties have so stipulated at paragraph 5a of the Joint Pretrial Stipulation), previously incorporated herein as Finding of Fact paragraph number 1. The County never submitted evidence to the Court as to the nature or type of nude entertainment, nor whether it was lewd or lascivious, nor any description of the nature or type of dancing. The parties have agreed that [**6] under the ordinances in

effect, the entertainment at Thee Dollhouse III is "non-obscene, nude dancing." Therefore, no finding of fact is made herein with regard to the exact nature or type of nude dancing. This same finding still pertains to the instant proceeding. [*1572]

4. Additionally, neither party has chosen to introduce any factual matter or issue of law relating to the applicability or non-applicability of the dispensing of alcoholic beverages and what effect, if any, under the Twenty-First Amendment this might or could have upon the rights of the County to exercise some zoning restraint under its police power. Therefore, again, there is no finding of fact made herein or conclusion of law premised upon the aforegoing, since the parties both seemingly do not consider it relevant and have not presented it to the Court as a matter to be determined. n2 This same finding still pertains to the instant case.

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n2 Cf. International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986) (remanding to district court to consider, among other things, the Twenty-First Amendment issue, where the ordinance in question specifically related to establishments that both served alcoholic beverages and provided nude entertainment).

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5. Although no special zoning studies seem to have been made as a predicate for the adoption of the zoning

ordinances, testimony and evidence were adduced that they are modeled after the City of Detroit ordinances.

6. Thee Dollhouse III is located within 1,000 feet of a church, the Kingdom Hall of Jehovah's Witnesses, at 3765 N.E. 18th Terrace. The two buildings are approximately 885 feet apart. The business is also located within 500 feet of a residential district to the east, in the incorporated municipality of Lighthouse Point. There are three residential properties within 500 feet of the nightclub. As to one of those properties, only a portion of the backyard is within 500 feet of Thee Dollhouse III. As to the other two, the buildings themselves are within 500 feet.

7. On December 15, 1987 Thee Dollhouse III filed a petition with the County's Building and Zoning Enforcement Division seeking an automatic waiver of the 500 foot residential district prohibition, pursuant to Section 39-225(b). That provision reads:

> It shall be unlawful hereafter to establish any designated use within unincorporated Broward County if the proposed location is within 500 feet of a residentially zoned [**8] district. This prohibition shall be waived upon the presentment to the building and zoning enforcement division of a written petition requesting such waiver, signed by 51 percent of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed location of the designated use. The circulator of the petition requesting a waiver shall subscribe and swear to an affidavit attached to the petition that the circulator personally witnessed the signatures on the petition and that the signatures were affixed to the petition by the persons whose names appear on the petition. Said petition shall bear at the top of each page thereof a

typewritten title in substantially the following form:

> "The undersigned hereby request a waiver from the Building and Zoning Enforcement Division of Broward County, Florida, that shall permit the establishment and location of a (an) (state specifically which designated use is sought to be established) within 500 feet of my real property, residence or business."

Building and zoning enforcement division shall carefully investigate the petition and signatures on the petition to verify that the petitioners do [**9] in fact own real property, or reside or do business in a residentially zoned district within 500 feet of the proposed designated use. Measurement of the 500 feet shall be made in accordance with subsection (c) hereof.

8. The petition filed by plaintiff contained the signatures of more than 51% of those persons residing, and owning residential real property, within 500 feet of Thee Dollhouse III, but did not contain signatures of any persons operating or managing a business, or owning commercial real property, within 500 feet. The petition was rejected by the County because it did not contain any signatures from the latter group. Plaintiff then requested a waiver of the distance restrictions [*1573] from the County's Planning and Zoning Board and it was denied. The Broward County Commission likewise denied the waiver of distance restrictions.

9. The petition contained the signatures of the two owners of a duplex, and six signatures of residents of that duplex. The two owners were Michael J. Peter, an owner

of International Eateries of America, Inc. and Centerline Associates, Inc., whose president is James Williams. James Williams circulated the petition and also signed the petition as president [**10] of Centerline Associates, Inc. Centerline Associates, Inc. is a company which does construction and maintenance work for plaintiff and for Michael J. Peter. All of the residents of the duplex who signed the petition were current or previous employees at Thee Dollhouse III.

10. Said duplex was purchased in June or July of 1987 for $ 125,000.00 and sold in January of 1989 for $ 125,000.00.

11. The petition, which was signed by eight people, did not include any signatures of owners or residents of the second duplex apartment, nor did it include any signatures of owners of property within 500 feet of Thee Dollhouse III on which businesses operate, or signatures of operators or managers of those businesses. Shirley Maurer, Chief Zoning Inspector for Broward County, testified that she received the petition from plaintiff and that she knew there to be many more than 15 persons in the group or universe of potential signators. Ms. Maurer's knowledge of the businesses in the area of Thee Dollhouse III was based on her review of zoning certificates in the area which her office maintains for businesses operating in unincorporated Broward County. The petition was rejected by Broward County on [**11] or about December 22, 1987, because it did not contain the required signatures.

12. The waiver provision of Section 39-225(b) has been interpreted by Broward County Building and Zoning Enforcement Division to require signatures of 51% of a set of persons which includes all owners of property

within 500 feet and all residents or business operators or business managers within 500 feet. Shirley Maurer testified that the provision had been interpreted and applied the same way to other petitions and that waivers had been granted based upon such petitions.

13. Plaintiff applied to the Broward County Board of adjustment for a variance from the 1,000 foot and 500 foot distance requirements. Shirley Maurer testified that the standards considered by the Board of Adjustment in granting or denying variances are:

a) whether special conditions exist on the property which do not exist on other property in the same district,

b) whether the need for the variance results from a self-imposed hardship, and

c) whether the variance applied for is the minimum variance that will permit the reasonable use of the land.

14. On June 2, 1988, the Board of Adjustment denied plaintiff's request for a variance [**12] because the need for the variance was caused by plaintiff's own actions. Plaintiff opened and began operation of Thee Dollhouse III in violation of the existing zoning provisions.

15. On June 21, 1988, plaintiff filed this action for declaratory judgment, permanent injunction and attorney's fees.

16. The only evidence presented by plaintiff was through James Williams concerning the circulation and submission of the petition and the purchase and sale of a duplex.

17. Plaintiff introduced no evidence regarding Broward County's treatment of the plaintiff with respect to the 1,000 foot church distance provision, although the plaintiff has stipulated that the business is within 1,000 feet of a church.

18. The plaintiff did proffer evidence regarding the value of residential property in the same subdivision as the church, although it was acknowledged that none of these residential properties is within 500 feet of the adult nightclub.

[*1574] CONCLUSIONS OF LAW

1. In Dollhouse I, this Court previously held that Sections 39-225 through 39-229 of the Broward County Code of Ordinances (the "distance ordinances") are facially valid time, place and manner regulations Id. at 18. The sole issue [**13] before the Court in this case is Broward County's treatment of plaintiff with respect to the distance ordinances.

2. Plaintiff did not introduce any evidence to establish that Broward County unconstitutionally applied the church distance provision to plaintiff, or that the application of the provision has an unconstitutional effect. Rather, the plaintiff stipulated that it was within 1,000 feet of a church. The testimony of Shirley Maurer established that plaintiff applied for a variance of the church distance provision, and that the application was denied. No evidence was presented to establish that Broward County acted arbitrarily, capriciously, or in any way unconstitutionally to enforce the church distance provision.

3. The evidence introduced in Dollhouse I, by Leigh Kerr and the study he prepared, established that there are 26 potential sites in unincorporated Broward County in which adult businesses may operate without violating the distance provisions. Therefore, the evidence does not establish that the church distance provision has an unconstitutional effect on plaintiff. Renton v. Playtime Theatres, Inc., 475 U.S. 41 at 53, 54, 89 L. Ed. 2d 29, 106 S. Ct. 925.

4. The only evidence introduced by the [**14] plaintiff regarding the application of the residential distance requirement was that of James Williams regarding the petition submitted to obtain a waiver of the requirement, the petition itself, and letters pertaining to the petition. Mr. Williams' testimony established that two residences were within 500 feet of Thee Dollhouse III, and that plaintiff attempted to comply with the petition requirements by having one of its principals and another entity buy one of the two residences and obtain the signatures of plaintiff's own employees as residents. Plaintiff did not attempt to obtain signatures of any businesses within 500 feet of its location, and did not obtain signatures from the other residential property.

5. Shirley Maurer testified that the waiver provision has consistently been interpreted to require signatures of 51% of a universe of people which includes all of those listed in the ordinance, that it was so applied to plaintiff, and that other businesses have obtained waivers. Ms. Maurer also testified that property owners, residents and business operators all have an interest in the location of adult uses near them, and that those interests are different. This Court concludes [**15] that the waiver provision as interpreted by the Building and Zoning Enforcement

Division has not been arbitrarily or capriciously applied to this plaintiff.

6. Live entertainment, as well as political and ideological speech is protected by the First Amendment. Erznoznik v. City of Jacksonville, 422 U.S. 205, 45 L. Ed. 2d. 125, 95 S. Ct. 2268 (1975); Schact v. United States, 398 U.S. 58, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970). "Nudity alone" does not place otherwise protected material outside the protection of the First Amendment, although obscenity is not protected by the First Amendment. Cf. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975); Jenkins v. Georgia, 418 U.S. 153, 41 L. Ed. 2d 642, 94 S. Ct. 2750 (1974) with Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957).

7. The Eleventh Circuit Court of Appeals recently addressed the Constitutionality of an ordinance that limited nude dancing. International Food & Beverage Systems v. Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986). The court there stated: "[we] may take it for granted that nude dancing is Constitutionally protected expression, at least if performed indoors before pay customers and not . . . before casual viewers." Id. at 1525. See also Krueger v. Pensacola, 759 F.2d 851, 854 (11th [**16] Cir. 1985).

[*1575] 8. Although the power of local governments to zone and control land use is unquestionably broad and within their fundamental police powers, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest. United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968); Schneider v. State, 308 U.S. 147, 84 L. Ed. 155, 60 S. Ct. 146

(1939). In determining the appropriate level of scrutiny to be applied to a challenged ordinance, a critical inquiry is whether the ordinance is aimed at suppressing protected expression or whether its primary goal is a matter within the legitimate police powers of the governmental entity which has a secondary or incidental impact on protected speech. Compare Stromberg v. California, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931) (striking down a law that prohibited expression by displaying any flag, badge or banner as content-based as opposed to content-neutral); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535-36, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980) with Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (upholding ordinance that prohibited the posting of signs on public property as content-neutral).

9. The [**17] Supreme Court has consistently held that the First Amendment forbids the government to regulate speech in order to exclude the expression of certain points of view from the marketplace of ideas. See Bolger v. Youngs Drug Products, 463 U.S. 60, 65, 72, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535-36, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980); Carey v. Brown, 447 U.S. 455, 462-63, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980). The total suppression of protected ideas subjects the law to strict scrutiny and places the burden on the governmental entity to show a compelling state interest in support of its law. See Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983); Widmar v. Vincent, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S.Ct. 269 (1981).

10. In contrast, a viewpoint-neutral regulation may

be analyzed within the framework established by the Supreme Court in United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968):

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment [**18] freedoms is no greater than is essential to the furtherance of that interest. (underscoring supplied) Id. at 377. As the Court's language indicates, a content-neutral regulation will be subjected to a somewhat heightened, though not strict, standard of scrutiny. In this situation, the ordinance will be analyzed as a time, place or manner regulation. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L.Ed.2d 221, 104 S. Ct. 3065 (1984). n3

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n3 The Supreme Court has stated that the four-factor standard of O'Brien is essentially the same standard applied to time, place or manner restrictions. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 n. 8, 82 L.Ed.2d 221, 104 S. Ct. 3065 (White, J. for the majority), 308 n. 6 (Marshall J. on behalf of himself and Brennan, J., dissenting (1984).

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11. The Supreme Court has held, in the context of a distance ordinance, that a municipality can differentiate between adult theaters and other theaters in attempting to

combat the "secondary effects" of such theaters, i.e., preserving the character of the neighborhood. The Court reasoned:

[We] have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, [**19] either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that [*1576] the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances. Young v. American Mini Theatres, Inc., 427 U.S. 50, 62, 49 L. Ed. 2d 310, 96 S.Ct. 2440 (1976). The Court concluded that the distance ordinances at issue were content-neutral and, therefore, analyzed the state's interest within the time, place and manner framework in upholding the ordinances.

12. Analyzing the subject distance ordinances as time, place and manner regulations, utilizing the O'Brien factors, the Court has little difficulty in concluding that the distance ordinances are facially valid. First, it is clear that the governmental interest meant to be furthered here, as it was in Young and Renton, is within the police powers of the government and is sufficiently substantial or important. The County stated that the purpose of the distance ordinances is to avoid the secondary effects that adult entertainment establishments have on neighboring property values, which [**20] if left unchecked, may cause blight.

13. There is, additionally, record support that confirms the County's primary motivation for adopting the distance ordinances. First, the preamble to Ordinance No.

78-33 itself states that the ordinance is being passed because "it has been demonstrated that the establishment of certain businesses in business districts has a deleterious effect on both the business and residential segments of the neighborhood, causing blight and downgrading of the property values." Second, the County's Senior Planner confirmed that these are the reasons the County adopted the distance ordinances.

14. Although there was no evidence that the County actually conducted a study to confirm that adult entertainment establishments cause blight and a downgrading of the property values, Renton established that the County may properly rely on studies conducted in other cities and/or the actual experiences of other cities in determining how best to accomplish its goals. 106 S.Ct. at 931. The County Attorney indicated in this case that the subject ordinances were patterned after those enacted in Detroit and upheld by the Supreme Court in Renton. In justifying the distance [**21] ordinances, it is enough that the County relied on Detroit's experiences.

15. Continuing with the O'Brien analysis, the Court concludes that the distance ordinances are narrowly tailored. The distance ordinances, by themselves, do not have the effect of excluding all adult entertainment establishments within unincorporated Broward County. As the County demonstrated, there are at least 26 sites within the County where adult entertainment establishments could operate without violating the distance requirements. Based thereon, this Court concludes that a reasonable number of locations exist where adult entertainment can be presented unaffected by the distance ordinances as is constitutionally mandated. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986);

International Food & Beverages Systems v. Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986).

16. The Doctrine of res judicata provides that when a final judgment has been entered on the merits it is a finality as to the claim in demand or controversy, not only as to every matter which was offered to sustain or defeat the claim, but also as to any other admissible matter which could have been offered for that purpose. [**22] Nevada v. United States, et al., 463 U.S. 110, 77 L.Ed. 2d 509, 103 S. Ct. 2906 (1983); McWilliams v. McWilliams, 804 F.2d 1400 (5th Cir. 1986); Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499 (11th Cir. 1984). The issues raised by plaintiff's pleadings and responses to discovery either were addressed in Dollhouse I, or should have been raised therein.

17. Plaintiff has claimed that the "waiver" provision of Section 39-225(b) of the Broward County Code of Ordinances constitutes an unconstitutional prior restraint on plaintiff's First Amendment rights. A prior restraint claim arises when governmental personnel are vested with [*1577] discretion to either permit or deny the exercise of a protected right, without procedural safeguards. Southeastern Promotions, Ltd. v. Conrad, et al., 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975).

18. The waiver provision is not an unlawful prior restraint as applied to plaintiff because plaintiff has never been prevented or restrained from presenting its adult entertainment by application of the ordinance, and plaintiff may not assert that the waiver provision is a facially invalid prior restraint in light of this Court's holdings in Dollhouse I.

19. Plaintiff claims that the language of [**23]

the provision is vague and that such vagueness allows the Zoning Division too much discretion, creating the opportunity for unlawful prior restraint.

20. The court in Young v. American Mini Theatres, 427 U.S. 50, 49 L.Ed.2d 310, 96 S. Ct. 2440 (1976), held that the respondents could not raise the issue of vagueness of an ordinance that clearly applied to them. Id. at 59. In this case, the residential distance restriction clearly applies to prohibit plaintiff from operating an adult business at the site of Thee Dollhouse III. Further, the petition submitted by plaintiff clearly did not comply with the requirements of the waiver provision. Section 39-225(b) requires that a petition contain the signatures of 51% of those people owning real property, residing or operating or managing a business within 500 feet of the adult use. Plaintiff's petition contained no signatures of operators and managers of businesses. Evidence shows that many businesses are located within 500 feet of Thee Dollhouse III. Therefore, plaintiff clearly did not satisfy the requirements of the waiver provision.

21. The distance ordinances, including the waiver provisions, were held by this Court to be a facially valid time, place and manner [**24] restriction. Plaintiff claims that the provision is so vague that the Division may act to prevent anyone from coming within its provisions. This allegation is an attack on the facial validity of the provision and, therefore, is not before the Court; it was decided in Dollhouse I. This Court has re-reviewed its previous holding as to the facial validity of the distance ordinances, particularly considering all the additional testimony, arguments and positions taken by the parties in this Dollhouse II case, and hereby concludes that the original ruling herein remains valid and this Court hereby

REAFFIRMS and READOPTS its position in the scope of and including all of the proceedings in Dollhouse I and Dollhouse II.

22. The waiver provision of the distance ordinance does not constitute an invalid prior restraint on plaintiff's exercise of its constitutional free speech rights because the ordinance includes sufficient safeguards to prevent the Division from arbitrarily withholding a waiver. The waiver section provides:

> The prohibition shall be waived upon the presentment to the building and zoning enforcement division of a written petition requesting such waiver, signed by 51 percent [**25] of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed location of the designated use.

The cited section clearly establishes the criteria for obtaining a waiver by petition and does not leave discretion in the Division. It provides that a waiver shall be granted upon submission of a petition containing a specific percentage of certain signatures. These criteria insure the fair application of the provision to all applicants and do not provide opportunity for the Division staff to discriminate between differed speakers or messages.

23. Plaintiff further claims that the provision of Section 39-225(b) which requires the Division to "carefully" investigate the petition vests the Division with discretion to reject a petition for unspecified reasons or to indefinitely delay approval. The provision states:

> Building and zoning enforcement division shall

carefully investigate the petition and signatures on the petition to verify that the petitioners do in fact own real property, or reside or do business in a residentially zoned district within 500 feet of the proposed designated use. [*1578] Section 39-225(b), Broward County Code [**26] of Ordinances.

The provision when read in its entirety includes criteria to limit the Divisions's investigation to the single factual issue of verifying ownership. Therefore, the waiver provision contains sufficient objective criteria to prevent the Division from restricting plaintiff's operation in a discretionary manner. Also, plaintiff's petition for waiver was reviewed and rejected in a timely manner within approximately one week of its submission. Plaintiff clearly did not suffer from any alleged indefinite delay and, therefore, has no valid "as applied" challenge.

24. In holding these distance ordinances valid, including the church and school provisions, this Court impliedly found that the term "church," although not specifically defined in the Broward County Code of Ordinances, has a clear enough common meaning to provide adequate notice to those persons who may be subject to the provisions of the distance ordinances. To the extent that any doubt may exist as to the meaning of "church," the court in Young held that minimal vagueness which is readily subject to a narrowing construction by the courts is not fatal. Young v. American Mini Theatres, 427 U.S. 50 at 61, 49 L.Ed.2d 310, 96 S. Ct. 2440.

25. [**27] Courts have consistently held that zoning and other regulations applicable to churches also apply to Jehovah's Witness Kingdom Halls. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of

Lakewood, Ohio, 699 F.2d 303 (6th Cir. 1983); Minney v. City of Azusa, 164 Cal. App. 2d 12, 330 P.2d 255 (Cal. Dist. Ct. App. 1958). Both cases concerned the application of a comprehensive zoning code to a Kingdom Hall. In each case the Jehovah's Witness Kingdom Hall was treated as a church and subjected to the requirements of zoning ordinances regulating placement of churches.

26. Plaintiff has admitted in the Joint Pretrial Stipulation that Thee Dollhouse III is located within 1,000 feet of a church, therefore the ordinance clearly applies to plaintiff. As stated in Young, a litigant may not successfully claim that a regulation is vague as applied to it if its operations clearly fall within the provisions of the regulation. Young v. American Mini Theatres, 427 U.S. 50 at 59, 49 L. Ed. 2d 310, 96 S. Ct. 2440. This principle precludes plaintiff's vagueness claim.

27. Plaintiff claims that the distance ordinances are overbroad in that they prevent the location of a single adult nightclub within the specified distances of residences, [**28] churches and schools. The test of the distance ordinances do clearly regulate the location of a single designated use as well as prohibit the clustering of such uses. This Court in Dollhouse I held that the distance ordinances, which include the restrictions on the location of one club, are supported by a sufficiently substantial governmental interest and are narrowly tailored. Memorandum Opinion at 18-20. Plaintiff's overbreadth claim is based entirely on the facial validity of the legislative determination to adopt the ordinance; it is not an as applied challenge. Therefore, plaintiff's overbreadth claim is barred by this Court's previous holdings regarding the distance ordinances.

28. The distance ordinances do not prevent plaintiff from presenting nude dancing as entertainment; they require that it not present such entertainment at the present location of Thee Dollhouse III. Plaintiff is free to exercise its free speech rights at any of the other locations which are permitted by the ordinances. Therefore, considering the judgment in Dollhouse I, and the adequate alternative sites available to plaintiff, it is clear that the distance ordinances do not substantially restrict [**29] plaintiff's freedom of expression.

Accordingly this Court finds as a matter of law that the distance ordinances challenged herein (both) are facially and as applied to plaintiff Constitutional and thereupon, the relief sought by the plaintiff should be and is hereby DENIED. A Final Judgment will be entered in accordance [*1579] with law under even date herewith. n4

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n4 This court has also received and reviewed a Brief of Amicus Curiae submitted by and in behalf of:

Saint Nicholas Episcopal Church
First Presbyterian Church
New Covenant Church
Trinity United Methodist Church
St. Paul The Apostle Catholic Church
St. Elizabeth Church
Hope Lutheran Church and School and
The North Broward School.

There are seven churches and two schools located in the vicinity of the plaintiff's adult nightclub which is operated at 3561 North Federal Highway in the

unincorporated area of Broward County, Florida.

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DONE and ORDERED in Chambers at Miami, Southern District of Florida this 15 day of DECEMBER, 1989. [**30]

FINAL JUDGMENT - December 15, 1989, Filed

Pursuant to and in accordance with the Memorandum Opinion containing Findings of Fact and Conclusions of Law included herein under even date herewith, it is thereupon

ORDERED and ADJUDGED that Final Judgment be entered herein as follows:

1. Broward County Ordinances 39-225 through 39-229 contained in the Broward County Code of Ordinances be and they hereby are held and adjudged to be facially valid time, place and manner regulations, and are not unconstitutionally applied to this plaintiff.

2. Based upon the aforegoing, the complaint herein is DISMISSED WITH PREJUDICE and judgment is hereby entered in this action in favor of defendant and against the plaintiff.

3. Defendant shall recover its costs by and from plaintiff upon the filing of a bill of costs to be taxed by the Clerk of Court.

DONE and ORDERED in Chambers at Miami, Southern District of Florida this 15 day of DECEMBER, 1989.

Respectfully submitted,

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Counsel for Petitioner

DATED: January 14, 1992